Supreme Court, U.S.
FILED

95-578 SEP 18 1995

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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1995

Abraham M. Lurie, *Petitioner*

v.

Richard A. Halderman, Jr., Marina Group of Companies, and Bank of Montreal, Chapter 11 Trustee, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 1995

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QUESTIONS PRESENTED

(1) Whether a Bankruptcy Court can confirm a Plan of Reorganization which violates state partnership law.

(2) Whether an appeal is moot where a constructive trust can be imposed to remedy the effects of an improperly entered confirmation order without adversely effecting the rights of third parties.

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IN THE SUPREME COURT OF THE UNITED STATES
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Richard A. Halderman, Jr., Marina Group of Companies, and Bank of Montreal, Chapter 11 Trustee, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Abraham M. Lurie respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the Ninth Circuit Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals are unreported.

JURISDICTION

The Court of Appeals entered its Judgment on June 16, 1995 and a timely Petition for Rehearing was denied on July 12,

1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. §1129(a)(3) states:

> (a) The court shall confirm a plan only if all of the following requirements are met: . . .
>
> (3) The plan has been proposed in good faith and not by any means forbidden by law.

Id.

§1129(b) provides, in pertinent part:

> (b)(1) Notwithstanding Section 501(a) of this title if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under and has not accepted, the plan.

Id. (emphasis added.)

STATEMENT

Abraham M. Lurie ("Lurie") began acquiring and developing real estate in 1968 in the Los Angeles County Community of Marina

del Rey. Marina del Rey is a coastal community, and fee title to the properties which Lurie assembled was held by the County of Los Angeles. By 1968, Lurie had assembled ten (10) parcels by successfully negotiating original leases with the County of Los Angeles or by taking assignments of existing leases. While Lurie had occasional partners during the period of assemblage, by 1986 the sole partners of the Debtor, Marina International Properties, Ltd. ("MIPL") were Abraham M. Lurie and Real Property Management, Inc. ("RPM"), a corporation wholly owned by Lurie. (Tr., 2/9/93, P. 16-18).

As of 1986, the Partnership's assembled properties consisted on one (1) vacant parcel[1], six (6) non-hotel properties consisting of shopping centers, marinas and apartment buildings, and three (3) hotels:

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[1] This parcel was transferred to another partnership and was not involved in the administration of this estate. Likewise, a shopping center owned by a Lurie affiliate in El Paso, Texas was not involved in the administration of this estate.

the Marina Beach Hotel, the Marina del Rey Hotel and the Marina International Hotel. In 1987 and 1988, MIPL began refinancing several of its properties in order to obtain funds to maintain its operations and complete the construction of its final acquisition, the Marina Beach Hotel. By 1988, the Partnership was suffering from cash shortages and sought a portfolio loan. Working with Merrill Lynch, Lurie sought, but was not able to obtain, a portfolio loan for the Partnership. Working through the brokerage firm of Cross and Brown, Lurie commenced discussions with representatives of Sheikh Abdulaziz Al-Ibrahim ("Sheikh Al-Ibrahim"), the controlling principal of what came to be known as the Marina Group of Companies (the "Marina Group"). In the course of these discussions, the Marina Group engaged in extensive due diligence concerning the financial condition of the Partnership. The Marina Group was fully advised as to the general stability of the non-hotel properties and the substantial

losses being sustained in connection with the operation of the Marina Beach Hotel. Initially, in August of 1988, Sheikh Al-Abrahim considered making a $175 Million participating convertible loan to the Partnership. Shortly thereafter, the amount was reduced to a $160 Million participating convertible loan. Thereafter, Sheikh Al-Ibrahim advised Lurie through his representatives that he preferred to do an equity deal. By June, 1989, the Marina Group entities had been formed for the purpose of their admission as partners in MIPL. (Tr., 2/9/93, P. 16-21).

Because of Los Angeles County's interest in the Partnership's leaseholds, the approval of the County of Los Angeles was a necessary condition precedent to the admission of the Marina Group entities as general partners in the Partnership. In connection with obtaining County approval, Sheikh Al-Ibrahim's representatives met with County officials and assured Los Angeles County Beaches and

Harbors Director Theodore Reed that Sheikh Al-Ibrahim intended to make substantial capital contributions to the Partnership toward renovating and redeveloping the Partnership's properties. (Tr. 1/14/93, P. 12-48). The MIPL Partnership Agreement was approved for execution on June 21, 1989 when the Marina Group was admitted as a limited partner of the Partnership and was effective August 24, 1989 after the County of Los Angeles approved the Marina Group's admission to the Partnership as general partners. (Exhibit 201, Excerpt 1). As of June 21, 1989, the partners valued the assets as worth $186.7 Million subject to liabilities of $147.3 Million. Based on this analysis, the Marina Group invested $21,830,000 in the Partnership in return for a 49.9% partner's interest in the Partnership. Lurie and RPM retained a 50.1% interest in the Partnership as both general and limited partners with an acknowledged capital account of $21,917,495 (Tr., 2/9/93, P. 21-23; Exhibit 201).

The parties' 74-page Partnership Agreement is the product of intense negotiations between sophisticated parties. At the time of the Marina Group's admission, the Partnership was losing money and was in need of new funds to redevelop its properties. The Partnership Agreement specifically addresses the need to work out the Partnership's $50 Million obligation owed to its largest creditor, the Bank of Montreal ("BOM"), which held the first lien against the Marina Beach Hotel. Lurie did not have the required funds to solve these problems which is why he agreed to the admission of the Marina Group to the Partnership. Lurie anticipated that as additional funds became necessary, Sheikh Al-Ibrahim would provide them. Based on Lurie's knowledge and concerns, he negotiated to soften the impact of anticipated future contributions on the partner's ownership interests and profit interests. Lurie succeeded in the negotiations. Specifically, Section 5.3 of the

Partnership Agreement, appearing at pages 20 through 23, and Section 2.47 of the Partnership Agreement, entitled "Residual Value Percentage," embody the partners' negotiated agreement as to the effect of future contributions made to the Partnership by either partner. (Tr., 2/9/93, P. 26-30).

Section 5.3(a) provided that in the event the Partnership determined that additional capital was necessary it was required, to the extent feasible, to attempt to borrow the funds from third parties. As an alternative, Section 5.3 provided that the Partnership could call for additional capital contributions. A capital contribution could not be forced upon the partners as a vote of 75% of the partnership interest holders was required to authorize a call for the additional capital. However, in the event the parties agreed to a capital call and any partner failed to contribute his or its share of the additional capital, such partner would be deemed a "defaulting partner" under

Section 5.3 of the Partnership Agreement, and any "non-defaulting partner" was presented by the Partnership Agreement with two alternatives: (i) make a defaulting partner loan to the defaulting partner in the amount of the defaulting partner's unpaid share of the additional capital with the funds being contributed directly to the Partnership; or (ii) proceed against the defaulting partner, at law or in equity, to satisfy such partner's liability for the defaulting partner's unpaid share of the additional contribution, exercising any other right or remedy existing at law or in equity.

Upon the funding of additional contributions pursuant to Section 5.31, the reallocation of interests provision of Section 2.47 of the Partnership Agreement came into play. This provision of the Partnership, appearing at Pages 17 and 18, states:

> 2.47. "Residual Value Percentage" means the percentage computed in the following manner: (i) with respect to the Class 2 partners as a group [the Marina Group], 100% multiplied by a fraction, the

> numerator of which is the aggregate of the initial contributions and the additional contributions of all Class 2 partners less the aggregate of all defaulting partner loans to all Class 2 partners, and the denominator of which is the aggregate of the initial contributions and the additional contributions of all partners, less all defaulting partner loans; or (ii) with respect to RPM and the Class 1 limited partners as a group, 100% multiplied by a fraction, the numerator of which is the aggregate of the initial contributions and the additional contributions of RPM and the Class 1 limited partners as a group, less the aggregate of all defaulting partner loans to RPM or the Class 1 limited partners, and the denominator of which is the aggregate of the initial contributions and the additional contributions of all partners, less all defaulting partner loans.

Id.

Section 2.47 of the Partnership Agreement has the effect of minimizing the impact on ownership of Partnership interests caused by additional contributions to the Partnership. Both partners had capital accounts of approximately $20 Million upon the admission of the Marina Group. Assuming a need for $20 Million and the contribution of those funds to the Partnership by the Marina Group

pursuant to Section 5.3(i) of the Partnership Agreement, $10 Million would be considered additional capital from the Marina Group and $10 Million would be considered additional capital from Lurie obtained through a defaulting partner loan. In this hypothetical, Lurie's interest in the Partnership would be reduced from 50.1% to 40% in accordance with Section 2.47. As an alternative, Section 5.3(ii) of the Partnership Agreement provides that the contributing partner may sue the defaulting partner and obtain a judgment in the amount of the additional capital which the defaulting partner failed to contribute. By pursuit of this remedy, a contributing partner would receive a percentage increase in ownership interest pursuant to Section 2.47 and eventually obtain a charging order against the defaulting partner's interest in the Partnership. However, the defaulting partner's "partnership interest" would remain

inviolate.[2]

After the admission of the Marina Group, and as contemplated by the Partnership Agreement, the partners obtained an extension of the BOM loan. In connection with obtaining the extension, Lurie and the Marina Group each contributed approximately $1.5 Million. Thereafter, the Partnership faced a projected $5 Million operating deficit for 1990. Lurie, as managing partner, attempted to borrow the funds for the Partnership. Lurie's efforts were unsuccessful and the Marina Group refused to either contribute the necessary funds or to guarantee repayment of any loan. Lurie sought to sell assets but the Marina Group refused. (Tr., 2/9/93, P. 32). The projected deficit became a reality as 1990 progressed and the Partnership had difficulty meeting its obligations. In June of 1990, the Marina Group approached Lurie

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[2] Lurie himself filed for Chapter 11 relief in June, 1991 and had the protections of said chapter available to otherwise protect the interest of his creditors in MIPL.

and asked him if he would be willing to sell out his interest in the Partnership. Lurie agreed to consider the proposal in light of his failed expectations concerning the Marina Group's infusion of additional capital for operations and renovation into the Partnership. After many months of discussion, the parties entered into a binding Letter of Intent on October 26, 1990. (Tr. 2/9/93, P. 31-36). The Letter of Intent provided that Lurie would sell his interest in the Partnership to the Marina Group through a series of tax-free exchanges. The agreement required arbitration in the event of a dispute or a default. The parties did not close on the agreement, however, and arbitration did not take place. Instead, in March, 1991, the Marina Group filed an action to dissolve the Partnership in State Court. Retired Judge Robert Lopez was appointed by the State Court as Receiver of the Partnership. On July 10, 1991, with the consent of the partners, Judge Lopez caused the Partnership to seek relief

under Chapter 11 of the United States Bankruptcy Code. During administration of the case below, Judge Lopez passed away and Richard A. Halderman, Jr. was appointed as Trustee of the estate. (Tr., 2/9/93, P. 36-40).

After the Partnership filed for Chapter 11 relief, Lurie attempted to raise capital to reorganize the Partnership with its existing partners. Judge Lopez requested that the partners submit proposed Plans for his review and comparison. Lurie was willing, but the Marina Group refused. (Tr., 2/9/93, P. 40-41). Likewise, the Marina Group never approached Lurie to discuss a Plan for the Partnership. Indeed, the Marina Group's chief Plan architect testified that no thought was given to proposing such a Plan. In the same vein, the Marina Group's CEO, Abdulazia Yahya, testified that he could not conceive of any reason why Sheikh Al-Ibrahim would consider a Plan for the Partnership that would include Lurie. (Tr.

12/1/92, P. 158-175; Tr., 12/2/92, P. 66-70).

On April 15, 1992, the Marina Group filed its First Plan of Reorganization in this case. The Plan called for a new value contribution exclusively from Sheikh Al-Ibrahim and provided that Lurie's interest in the Partnership be extinguished. (Tr. 2/9/93, P. 40-42). In response, Lurie filed a Plan of Reorganization on June 15, 1992 which provided that the Marina Group's interest in the Partnership would be extinguished and then reissued to new investors. The Marina Group filed its first Amended Plan of Reorganization on June 15, 1992 and the Bank of Montreal filed a Plan on the same date. Shortly thereafter, the Trustee joined with the Bank of Montreal as a co-proponent of the BOM Plan. At about this same time, upon the motion of the Marina Group, the Bankruptcy Court established a range of value for the Partnership's properties of $111.1 to $125.7 Million. The total secured debt of the Partnership at the time was approximately

$145 Million and unsecured debt was approximately $20 Million.

After all of the Plans were amended in August, 1992, the Court approved the Disclosure Statements as to each of the three competing Plans and ordered a joint mailing to all creditors and parties in interest. Each Plan provided for the impairment of most classes of claims. Each of the secured creditors voted to accept the Marina Group's Amended August 19, 1992 Plan except the Bank of Montreal. Only the Bank of Montreal and the unsecured creditor class it dominated voted to accept the BOM Plan. Only secured creditor Manufacturers Bank voted to accept Lurie's Plan. With each of the three competing Plans having an impaired consenting class, the Court scheduled the Confirmation Trial to begin on December 1, 1992.

The Confirmation Trial commenced on December 1, 1992 after the parties had filed their respective objections as to the confirmation of the other competing Plans.

Lurie's principal objection was that the Marina Group Plan seized the Partnership's assets for Sheikh Al-Ibrahim in violation of the Marina Group's fiduciary duty to Lurie under California State Law and in violation of 11 U.S.C. §§ 1129(a)(3) and § 1129(b). On the second day of the trial, Lurie withdrew his Plan because his investor withdrew his funding support. After ten (10) days of trial in December, 1992, and in January and February, 1993, the Court scheduled final argument concerning confirmation of the remaining competing Plans for April 20, 1993. On April 19, 1993, the Marina Group, the Bank of Montreal and the Trustee filed their "Joint Consensual Modified Plan of Reorganization Dated April 19, 1993" (the "Joint Modified Plan"). The Joint Modified Plan was modeled on the Marina Group's Second Amended Plan dated August 19, 1992 and contained new provisions incorporating the settlement reached by and between BOM and the Marina Group concerning the treatment of BOM's

secured and unsecured claims.

On April 29, 1993, the Court considered the statements of counsel for the Marina Group urging confirmation of the Joint Modified Plan. (Tr. 4/29/93, P. 78-93). The Court also heard oral argument on Lurie's objection to confirmation (Tr. 4/29/93, P. 96-144). On April 30, 1993, the Court announced its decision to overrule Lurie's objection and confirm the Joint Modified Plan. In overruling Lurie's objection, the Court held "in light of the Partnership's dissolution [there] is not a Partnership in the sense that the Agreement need be honored." (Tr. 4/30/93, P. 1-5). Accordingly, the Court entered its Confirmation Order and executed its Findings of Fact and Conclusions of Law as submitted by the Marina Group. Lurie timely appealed the Bankruptcy Court's Confirmation Order to the Ninth Circuit Bankruptcy Appellate Panel (the "Panel" or "BAP") and to the Ninth Circuit Court of Appeals.

The Panel dismissed Lurie's appeal as moot. In doing so, the Panel abdicated its responsibility to do justice by rejecting Lurie's prayer for the imposition of a constructive trust without any discussion whatsoever of the cases cited by Lurie to support its imposition under the facts of this case.[3] Lurie's Motion for Rehearing was denied, and the Ninth Circuit Court of Appeals Summarily affirmed the Panel's decision. Lurie's Petition for Rehearing in the Court of Appeals was denied.

REASONS FOR GRANTING THE PETITION

The Decision Below is erroneous, and the issue it addresses is important. By confirming a plan of reorganization which is contrary to state partnership law, the Ninth

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[3] See, e.g., In re Great Plains Western Ranch Co., 38 B.R. 899, 903 (C.D. Cal. 1984); In re Torrez, 827 F.2d 1299, 1302 (9th Cir. 1987); Edwards-Town, Inc. v. Dimin, 87 Cal. Rptr. 726, 731 (App., 1970); ASEA v. APEA, 825 P.2d 451, 455 (Alaska, 1991); In re Spirtos, 992 F.2d 1004 (9th Cir. 1993); Amalgamated Clothing and Textile Workers v. Murdock, 861 F.2d 1406 (9th Cir. 1988) and In re Worcester, 811 F.2d 1224 (9th Cir. 1987).

Circuit's decision directly violates 11 U.S.C. §§ 1129(a)(3) and 1129(b). The issue confronts bankruptcy courts with state law notions of fiduciary responsibility and affects how bankruptcy cases will be administered in the face of partnership agreements and state law. The questions presented are of national import as their determination will impact, and should impact, significant numbers of partnership Chapter 11 reorganizations.

I. The Bankruptcy Court's Confirmation of the Marina Group's Modified Plan of Reorganization Sanctioned a Breach of Fiduciary Duty Violative of California State Law and Public Policy, Contrary to 11 U.S.C. §§ 1129 (a)(3) and 1129(b).

A. A partner's fiduciary duty does not terminate upon the Partnership's dissolution or its filing for bankruptcy.

California Corporate Code ("CCC") §15021(1) requires that every partner hold for the partnership as trustee any benefits derived from any transaction connected with the operation or liquidation of the partnership. In the words of the statute:

> Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

CCC §15021(1). (emphasis added.)

California law clearly recognizes the proposition that a partner's fiduciary duty continues until final termination of the partnership's business affairs. Leff v. Gutner, 33 Cal.3d 508, 658 P.2d 740 (1983). The Marina Group did not even attempt to quarrel with this authority below, either at the Bankruptcy Court, at the BAP level, or at the Ninth Circuit Court of Appeals. Instead, they contended that the Sheikh's fiduciary duty to Lurie ended at the Bankruptcy Court's door. The Bankruptcy Court agreed, while the Panel side-stepped the issue by ruling only on whether Lurie's appeal was moot. The Court of Appeals affirmed the BAP's decision.

Contrary to the Bankruptcy Court's holding on April 30, 1993, the Marina Group's

fiduciary duty to Lurie did not terminate upon the filing of the state court dissolution action or the bankruptcy proceeding. Perhaps the most thorough evaluation of case law in the area of continuing fiduciary duties is the opinion of the Indiana Court of Appeals in Boushehry v. Ishak, 550 N.E. 2d 784, modified, 560 N.E. 2d 116 (1990), in which the Court considered the fiduciary duties of the partners following through dissolution of the partnership, but before final termination of the business:

> We emphasize that the fiduciary relationship of the partners continues until final termination of the business of the partnership. IC 23-4-1-21 expressly places each partner in the role of a trustee as to matters connected with the liquidation of the partnership. The courts have consistently held that, with respect to partnership business pending at the time of dissolution, the fiduciary duties of the partners remain intact. Leff v. Gunter, 33 Cal.3d 508, 658 P.2d 740 (1983); Rosenfeld, Meyer and Susman v. Cohen, 146 Cal. App. 3d 200, 194 Cal.Rptr. 180 (1983); Woodruff v. Bryant, 558 S.W. 2d 555 (Tx. App. 1977); Lavin v. Ehrlich, 80 Misc.2d 247, 363 N.Y. Supp.2d 50 (N.Y. App. 1978); Fouchek v. Janicek, 190 Ore. 251, 225 P.2d 783

(1950); 59A Am.Jur.2d Partnership § 443 (1987). From dissolution to final termination the partners need to be like Caesar's third wife, Calpurnia, above reproach.

Id.

In Leff, supra, the parties had formed a partnership to bid on a government construction project. One of the partners withdrew from the partnership and submitted an independent bid on the project, and was awarded the project several months later. The trial court determined the withdrawing partner had breached the fiduciary duty owed to the partnership. In affirming the trial court's decision, the Supreme Court of California elaborated on the continuing fiduciary duty of a withdrawing partner, concluding that the withdrawing partner could not compete with the partnership without the former partner's consent. The application of the foregoing California State Law concepts to bankruptcy proceedings was firmly recognized by the Ninth Circuit in Ragsdale v. Haller, 780 F.2d 794 (9th Cir. 1986).

While the Marina Group agrees that the Marina Group owed Lurie a fiduciary duty, it fails to give any meaning to the restrictions which the duty placed upon the partners in this case. A partner's fiduciary duty bars access to the everyday economic standards of the market place. This restriction takes on meaning by requiring that a partner may not derive for itself any benefit from any transaction connected with the partnership's business. Further, this duty does not terminate until the partnership's business affairs have been finally wound up. The terms "dissolution" and "termination" are not synonymous, and California State Law mandates that the fiduciary duty continues after "dissolution" and through "termination of the business." Leff, 33 Cal.3d at 508.

The Marina Group's Plan is nothing more than an attempt to get around the Sheikh's agreement with Lurie and to thereby "derive profits from the liquidation of the partnership" in violation of state law. Surely the

continuation of the Marina Group's duty to Lurie prevented it from withholding their capital from the partnership, forcing a partnership dissolution and then using Sheikh Al-Ibrahim's capital to acquire the partnership's assets through a plan of reorganization. These events did not just occur. They were obviously planned. Moreover, they were planned with the malignant faith that the equitable halls of bankruptcy would allow the Marina Group to spit on its partnership agreement with Lurie and squeeze him out notwithstanding the anti-dilution provisions of the MIPL Partnership Agreement.

The Marina Group's Plan thus violates partnership law and misuses the Bankruptcy Code. The Bankruptcy Court simply failed to recognize and enforce the basic fiduciary principle that a partner must either dedicate its efforts to reorganize the partnership for the partners collectively or pass on the

partnership's future promise.[4]

B. The Marina Group's Plan was not proposed in good faith and instead works the bad faith seizure of the Partnership's assets for Sheikh Al-Ibrahim.

To be proposed in good faith, a Chapter 11 Plan must ultimately achieve a result consistent with the Bankruptcy Code and public policy. In re Flushing Mall Company, 7 B.R. 277 (D.C.N.Y. 1980); In re Sovereign Group, 88 B.R. 325 (Bankr. Colo. 1988). Breaches of fiduciary duty are inconsistent

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[4] A constructive trust can be imposed, to eliminate any squeeze out of Lurie's interest. In the event the Marina Group decides to proceed to finalize the partnership's dissolution after the partnership's reorganization, it is free to do so under state law. In this regard, the Partnership Agreement provides a smooth mechanism for the division of the partnership's assets in the event of dissolution (Article X, pages 56 through 66, Exhibit 201). The subject provisions provide for either the division of the assets based on their values or by sale of the assets. While the Marina Group may protest that dissolution pursuant to the laws of the State of California will not provide them with as favorable a result as would their attempt to use the Bankruptcy Code to work a breach of fiduciary duty, partnerships are dissolved pursuant to state law and the Marina Group is bound by this concept.

with public policy, and Plan treatment which perpetrates a breach of fiduciary duty is not "fair and equitable" within the meaning of Code § 1129(b).

In In re Sovereign Group, the Court appointed Chapter 11 Trustee, together with other creditors, filed an amended Plan of Reorganization. The Plan provided for the replacement of the existing general partner (Pikeview) in a manner inconsistent with and violative of the Debtor's Limited Partnership Agreement. The Trustee argued that the Bankruptcy Code and the supremacy clause of the United States Constitution authorized the Court to confirm a plan which contravened the Limited Partnership's Agreement as to its amendment. The Court disagreed and held that a confirmable Plan had to contain provisions for amendment of the Partnership Agreement that complied with state law. In so ruling, the Court held:

> ...[It] is clear to this court, after examining the nature of partnerships and their importance under state law, that a partnership

> relation requires a plan proponent to comply with the terms of a partnership agreement when seeking confirmation of a plan of reorganization wherein that plan proposes to restructure the partnership by replacing or adding additional general partners.... As noted in this court's decision in In re Harms, 10 B.R. 817 (Bankr. Colo. 1981), a partnership agreement creates a fiduciary relationship among the members of the partnership....[A]s a matter of public policy the Bankruptcy Code is not intended to be used as a tool to restructure onerous partnership agreements.

Id. at 329. (emphasis added).

Although Bankruptcy Judge Sholl reached a contrary decision in In re Ingleside Associates, 136 B.R. 955, 962 (Bankr. E.D. PA 1992), in reaching his decision the Judge exhibited misplaced reliance on In re Acequia, Inc., 787 F.2d 1352 (9th Cir. 1986). In Acequia, the Court specifically declined to address the issue of whether bankruptcy law preempted state law by determining that Idaho state law specifically authorized the corporate charter amendments proposed by the plan there in question. Acequia, 787 F.2d at 1360-61.

In fact, the Ninth Circuit Court has consistently analyzed, outside of a partnership law context, the question of whether proposed plans violate state law provisions toward determining whether the requirements of Code § 1129 have been met. In In re Acequia, Inc, supra and Arizona v. Trustee for Westgate-California Corp., 609 F.2d 1274, 1278 (9th Cir. 1979), Cert. Denied, 444 U.S. 1015, 100 S.Ct. 667, 62 L.Ed. 2d 645 (1980) the Ninth Circuit recognized that Code §§ 1129(a)(1) and (3) require a plan to comply with state law as a prerequisite to confirmation. While Judge Sholl appeàrs to believe that changing business times warrant the eradication of age-old partnership principles, Judge Clark's decision in the Sovereign Group case, supra, is rooted in the Court's appreciation for the nature and importance of partnerships under state law and the unique relationship existing between partners.

In In re Manor Place Development Associates L.P., 144 B.R. 679 (Bank. D.N.J.

1992), the Court refused to confirm a Plan of Reorganization which provided that a general partner would be removed from management functions and replaced by a management committee. Citing In re Sovereign Group, supra, the Court stated that "the agreement among partners is unique in law because it is not only a legal relationship that is created but it reflects a personal relation or status somewhat akin to individuals in a marriage." Manor Place Development, 144 B.R. at 686. Finally, the Court addressed the plan proponents' contention that the Court was authorized to override partnership law by § 105 of the Code. In connection with this assertion, the Court responded as follows:

> This court declines such an invitation. It is a generally accepted equitable maxim that equity must follow the law. Furthermore, "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." Butner v. United States, 440 U.S. 48, 55, 99 S.C. 914, 918, 59 L.Ed.2d 136

> (1978). There are no federal interests present in this case to warrant this court to redefine the rights of the parties under the partnership agreements. Indeed, as noted by the Third Circuit in Southern Railway Company v. Johnson Bronze Company, 758 F.2d 137, 141 (3rd Cir. 1985), § 105 does not authorize the bankruptcy court to create rights not otherwise available under applicable law. It is one thing for a bankruptcy court to protect the economic interests of an estate, and quite another to abrogate a fundamental part of an agreement to which the Debtor and non-debtors are parties.

Id. at 687-88. (emphasis added.)

The evidence in the case at bar clearly demonstrates a cleverly calculated deliberate scheme to wipe out Lurie and the protections he negotiated into the Partnership Agreement regarding the contribution of new capital, the division of assets upon the winding up on the partnership's affairs, and the elimination of adverse tax consequences upon wind up. Abdulaziz Yahya testified that the Plan intentionally called for MIPL to transfer all of its assets to shell companies to be controlled solely by Sheikh al-Ibrahim. He testified there was no reason to even

consider including Lurie in the Reorganization Plan. Don Bredberg, a Plan architect, testified that the Sheikh and his numerous advisors never even calculated the viability of contributing new funds to the partnership pursuant to the provisions of the Partnership Agreement. Not only did the Marina Group not propose a Plan in good faith, it did not even expend a single moment considering a good-faith plan.

The MIPL partners have an express contract as to how their interests will be affected in the event future capital is necessary for the preservation of the partnership's assets.[5] It is clear that since

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[5] The MIPL Partnership Agreement does not, however, require the Marina Group to make a defaulting partner loan to Lurie. The Partnership Agreement makes that option available to the Marina Group. Alternatively, the Marina Group may contribute the funds necessary to continue the Partnership's business and bring an action against Lurie for the share of funds he should have contributed. As such, the Partnership Agreement is not a contract of financial accommodation within the meaning of 11 U.S.C. § 365 (c)(2). To construe the Partnership Agreement between the Marina Group and Lurie as a "contract to make a loan

filing for dissolution, the Marina Group has done everything in its power to denounce the Marina Group's fiduciary responsibility to Lurie and to seize the estate's assets for itself. There is simply no legal principal to support the proposition that a partner's fiduciary duty ends upon the filing of a bankruptcy petition. The Bankruptcy Court failed to recognize CCC §15021(1) which expressly states that no partners may obtain a benefit from any transaction "connected with the...liquidation of the partnership." Id. Everything the Marina Group has done has been in direct violation of this applicable statute.

The Marina Group has complained that the fiduciary duty position forwarded herein by Lurie is too sweeping. It is not. The law is simple. Partners have a duty to act for the benefit of their co-partners and their

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within the meaning of Code § 365 (c)(2), "as the Appellee attempted to do below, would be the equivalent of calling a dog with a tail a "tail."

existing partnerships to the exclusion of their self interest. If Sheikh Al-Abrahim desires to preserve his interest in the MIPL assets, he must do so only for the partnership's benefit and within the confines of the Partnership agreement. Assuming, arguendo, that Lurie's position is over-broad, the facts of this case still require a finding of bad faith <u>if any remnant</u> of a partner's fiduciary duty remains upon the filing of a bankruptcy. To reiterate, the dispositive facts are as follows:

(1) The partners agreed to a specific formula for redistribution of their partnership interests in the event additional capital was necessary to maintain the partnership's business.

(2) Sheikh Al-Ibrahim knew when he entered the partnership that the Marina Beach Hotel was suffering substantial losses and that the BOM loan would have to be restructured.

(3) Sheikh Al-Abrahim knew that additional capital would be needed to operate and redevelop the partnership's assets and told the County of Los Angeles he would provide it to gain admission to the Partnership.

(4) Sheikh Al-Ibrahim withheld neces-

> sary contributions pre-petition, and post-petition he never considered for a single instant the formulation of a Plan which did not exclude Lurie.

By confirming the Marina Group's Modified Plan, the Bankruptcy Court sanctioned an obvious breach of fiduciary duty. As Justice Cordozo made clear in Meinhard v. Salmon, 249 N.Y. 458, 463, 164 N.E. 545 (1928):

> Many forms of conduct permissible in a work a day world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.... Only thus has the level of conduct for a fiduciary been kept at a higher level than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court....

Id.

Justice Cardozo's fiduciary concept has been integrated into California's Code and case law. The concept that a partner may not seize the partnership's assets has been recognized by the Ninth Circuit. The Joint

Modified Plan was patently unconfirmable as its provisions directly violated 11 U.S.C. §§ 1129(a)(3) and 1129(b), and this Court should impose a constructive trust in Lurie's benefit in order to make clear that a partner's fiduciary duty does not end at the Bankruptcy Court' door.

II. This Appeal is not Moot Because the Court can fashion effective relief to remedy the Marina Group's Breach of Fiduciary Duty by Imposing a Constructive Trust.

A. Imposition of a Constructive Trust provides an Effective Remedy.

Appellees have contended, and both the Panel and Ninth Circuit Courts have concurred, that the Court is powerless to do justice as the Shiekh has funded $10 Million in reliance on the Trial Court's Order of Confirmation and his Plan has been "substantially consummated" and the Appeal is moot. Both the Appellees and the Appellate Courts point out the transfer of MIPL's assets,[6] and

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[6] Code § 363(m) has no application as the assets of MIPL have not been sold by a Trustee or pursuant to § 363. Miami Center Limited Partnership v. Bank of New York, 838

they enumerate the benefits the Sheikh has bestowed upon MIPL's creditors, contending that reversal or modification of the Bankruptcy Court's Confirmation Order would wreck havoc and unfairly affect the rights of third parties not before the Court. The Ninth Circuit declares that "the plan has been so far implemented that disapproval at the appellate level would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court." (App. infra, 1.) These contentions ignore the classic time-tested remedy available to this Court to remedy the Marina Group's breach of fiduciary duty: the imposition of a constructive trust.

On direct appeal from a final decision, an appellate court has broad authority to

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F.2d 1547, 1553 (11th Cir. 1988), In re Onouli-Kong Land Co, 846 F.2d 1170 (9th Cir. 1988). Even if it applied as a general concept, it is inapplicable where the relief sought is a constructive trust which does not "affect the validity" of the "sale" as has been proposed by the Marina Group. 11 U.S.C. § 363 (m).

"modify, vacate, set aside or reverse an order of the district court, and it may direct such further action on remand as may be just under the circumstances." In re Roberts Farms, Inc., 652 F.2d 793, 797 (9th Cir. 1981). Constructive trusts may be imposed in bankruptcy proceedings. In re Great Plains Western Ranch Co., 38 B.R. 899, 903 (C.D. Cal. 1984). Here, as in In re Torrez, 827 F.2d 1129, 1302 (9th Cir. 1987), "equitable principles guide us. Bankruptcy is an equitable proceeding in which equity operates within the terms of the Bankruptcy Code." Id. Regarding the broad application and reach of the remedy of constructive trusts:

> A court of equity in decreeing a constructive trust is bound by no unyielding formula....Constructive trusts are creatures of equity. In dealing with them, equity will disregard mere form, and will ascertain and act on the substance of things, regarding that as done which should have been done.

Edwards-Town, Inc. v. Dimin, 87 Cal Rptr. 726,, 731 (App., 1970).

As the Court noted in ASEA v. APEA, 825

P.2d 451 (Alaska, 1991) [quoting Justice Story's Treatise]:

> In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice...where a new condition exists and the legal remedies afforded are inadequate or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found equal to the case, extending the old principles, if necessary ...for that purpose.

Id. at 455. See also Mancuso v. United Bank of Pueblo, 818 P.2d 732, 737 (Col. 1991) (The Doctrine of Constructive Trusts is extremely flexible).

In this case, Sheikh Al-Ibrahim caused the Marina Group to breach its fiduciary duty to Lurie by withholding funding for MIPL until he could acquire 100% ownership of MIPL's assets in contravention of the anti-dilution provisions of the MIPL Partnership Agreement through a Plan of Reorganization. The Bankruptcy Appellate Panel missed its mark in declaring:

> Even if the Panel were to find bad faith, imposition of a constructive trust on the assets which the New Owners purchased would inequitably impugn the accepted notions of finality and good faith reliance on

> a judgment. Lurie has not proposed a solution for undoing the transactions which the New Owners entered into in reliance of [sic] the plan confirmation order....

BAP Memorandum Decision at 7 (BAP 9th Cir. 1993) (No. CC-93-1585-McOH) (App., infra, 2).

Any transactions entered into by the "New Owners"[7] need not be undone. To remedy this breach, this Court need only declare that the new owners of the MIPL properties hold said properties in constructive trust for MIPL and subject to the equitable lien of MIPL. Further, for clarification, the Court's Order should provide that the MIPL Partnership Agreement shall govern the affairs of the new owners (in place of the Marina Group) and Lurie (and RPM) until the business of the partnership has been terminated. As such,

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[7] The "new owners" consist of MGC Marina del Rey International, a California partnership; MGC Marina Beach, a California partnership; and MGC Commercial, a California partnership. The Marina Group has conceded that the "New Partners" and "New Owners" were created and capitalized, and are owned and controlled, by principals of the Marina Group. Appellee Brief (the Marina Group of Companies at 13 (BAP 9th Cir. 1993) (No. CC-93-1585-McOH).

the new owners shall stand in the shoes of the Marina Group concerning their rights and obligations to Lurie and shall be governed by the MIPL Partnership Agreement and subject to California State Law. By the imposition of the constructive trust, no third party will be adversely affected and the breach of fiduciary duty by the Marina Group will be remedied. Furthermore, no inequity could possibly result as the Sheikh funded the Plan with clear knowledge of Lurie's objection. In re Spirtos, 992 F.2d 1004 (9th Cir. 1993).

This Court should acknowledge that there are no "New Owners" in this case. The Marina Group concedes, as follows, that the Marina Group and the "New Owners" are identical:

> Under the Plan, the properties were transferred to three (3) new partnerships for operations convenience and in response to demands of the Secured Lenders. Joint Modified Plan, Art. XIII, Sec. C, Lurie Ex. 7, Exhibit 1, pp. 47-48. For ease of reference, such new partnerships are referred to herein as the "New Owners." The New Owners are comprised of the New Partners as identified in the Plan. Joint Modified Plan, Art. I, Sec. A., pr. 86 (Lurie Ex. 7, Exhibit 1

> p. 12). The New Partners and New Owners were created and capitalized, and are owned and controlled, by principals of the Marina Group.

Appellee's Brief, at 13 (BAP 9th Cir.) (No. CC-93-1585) (emphasis added).

To put the matter plainly, Sheikh Al-Ibrahim caused the Marina Group of Companies to be partners in MIPL. Shiekh Al-Abrahim caused the Marina Group to breach its fiduciary duty to Lurie. Sheikh Al-Ibrahim formed the New Owners to reap the bounty of the breach of fiduciary duty worked on Lurie by confirmation of the Marina Group Plan. If Plan confirmation sanctioned a breach of fiduciary duty and was therefore improper, it is illogical to say that the wrong cannot be corrected because the New Owners are innocent third parties. By admission, the New Owners are capitalized and controlled by the Sheikh and are thus one and the same with the Marina Group. This being the case, this Court should grant certiori, reach the merits of

the Appeal, and impose a constructive trust.[8]

The imposition of a constructive trust in this case would not "create the type of unmanageable, uncontrollable situation which the court in Roberts Farms warned against." BAP Memorandum at 7. (App., infra, 2. See also, App. infra, 1). To the contrary, the payments described in the Affidavit of Clayton Corwin, discussed in the BAP's Memorandum Decision, would not be disturbed by the imposition of a constructive trust. The imposition of such a trust on the New Owners' interest in the former assets of MIPL would only affect the interest of Sheikh al-Ibrahim who breached his fiduciary duty to Lurie through manipulation of the Marina

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[8] While it is easy to say that Lurie should have sought a Stay, the practical reality was that it could not have been obtained. Every creditor of the estate would have opposed it and Lurie did not have the financial ability to pay for the bond to support it. Further, concurrently with his Order of Confirmation Bankruptcy Court Judge Ashland made clear that, if sought, a Stay would be denied. The constructive trust remedy was and is the only reasonably available alternative to provide justice in this case.

Group, and no other creditor, co-proponent, or third party would be affected. As it now stands, Sheikh Al-Abrahim has all of MIPL's assets while Lurie remains responsible for personal guaranties in excess of $30 Million arising from secured debt deficiencies, tax liability arising out of the ownership and operation of the partnership properties, and the confirmation of the Plan. The imposition of a constructive trust giving Lurie an equitable interest in the properties would balance these wrongfully imposed burdens with the wrongfully obtained benefits now exclusively enjoyed by Sheikh Al-Ibrahim.

B. <u>This Appeal is not Moot</u>.

The Bankruptcy Appellate Panel and the Court of Appeals wrongfully applied the law to the facts in this case when it dismissed Lurie's appeal as moot. An appeal will only be rendered moot where an appellant's failure to seek and/or secure a stay of a bankruptcy order permits a comprehensive change of circumstances to occur so as to render it

inequitable for the Court to consider the merits of an appeal. In re Roberts Farms Inc., 652 F.2d 793, 798 (9th Cir. 1981); In re Clark, 98 B.R. 979 (9th Cir. BAP, 1989); In re Blumer[9], 66 B.R. 109 (9th Cir. 1986). The touchstone of each of these decisions is the inability of the Court to grant "effective relief" without a resulting "inequity." In re Andreuccelti, 975 F.2d 413, 415 (7th Cir. 1992). As previously indicated, no such malady affects this Court's ability to do justice in the case at bar. The imposition of a constructive trust allows this Court to give complete and effective relief without prejudice to the rights of third parties. The imposition of a constructive trust can hardly be deemed "inequitable" as its very imposition takes place to conquer and defeat inequitable conduct.

In In re Spirtos, this Court re-enforced

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[9] In re Blumer's concern with funds paid to third parties is inapposite as Lurie seeks the imposition of a constructive trust and not the return of the funds paid to third parties.

the principle that courts of equity have the power to do equity. In that case, Doctor Spirtos stripped his pension fund of its assets to the detriment of his patient-malpractice victim after the Bankruptcy Court declared that the funds were not property of his estate. On appeal, the good doctor claimed that the case was moot as the pension funds had been spent and it would be inequitable to force him to replace the funds as they had been spent in justifiable reliance on the Bankruptcy Court's Order. This Court held:

> We can fashion [a remedy] by ordering the Debtor, who is a party to this appeal, to return the money to the estate. Nor would it be inequitable to address the merits of the appeal. Debtor knew at the time he received and spent his plan distribution that Moreno had appealed the Bankruptcy Court's decision.

Id.

An interesting Ninth Circuit case which deals with the breadth of the remedy of constructive trusts is Amalgamated Clothing and Textile Workers v. Murdock, 861 F.2d 1406

(9th Cir. 1988). Amalgamated Clothing is neither a bankruptcy case nor a mootness case. It should also be noted that the applicable law is Federal Law -- turning on the duties of ERISA fiduciaries and the propriety of establishing a constructive trust to remedy breaches of such fiduciary duties. Since such duties are the general duties one expects of fiduciaries under fiduciary law, the case is on point. As noted therein at page 1411, the objective in a scenario where there has been a breach of the fiduciary's duty of loyalty is to make the disobedience of the trustee to the duty of loyalty so prejudicial to him that he and all other trustees will be induced to avoid disloyal transactions in the future. In Amalgamated Clothing, fiduciary David Murdock ("Murdock") used a pension fund's assets in a greenmail scheme to increase the value of his stock in certain corporations. Additionally, he amended the subject pension plan so that all profits derived by the pension plan

from the greenmail scheme would flow to him. The Court faced the challenge of ERISA statues which allowed the damages flowing from a breach of fiduciary duty to flow only to the damaged pension plan entity. A remedy of constructive trust to this end would have been ineffective as Murdock would have still ended up with a huge profit from his wrongful conduct by virtue of his amendment of the plan. This being the case, the court imposed a constructive trust for the benefit of all other plan beneficiaries so that the ill-gotten gains would flow to them and not to the wrongdoer.

In many senses, the case of In re Worcester, 811 F.2d 1224 (9th Cir. 1987) brings the concepts of state law preeminence, mootness and constructive trusts together. In said case, the appellant contended that a foreclosure sale conducted under California law was invalid under California law and that, in light of his right of redemption under California law, his appeal was not

moot. In deciding in appellant's favor, the court noted at page 1228 that:

> Bankruptcy is basically a procedural forum designed to provide a collective proceeding for the sorting out of non-bankruptcy entitlements.... Consequently, the Supreme Court has repeatedly held that the rights of parties to a bankruptcy proceeding are 'created and defined by state law'.... If Worchester does have such a right under California law [to set aside a foreclosure sale], we are not powerless to enforce it, and we may grant Worchester relief to the same extent California courts would do in similar circumstances. Since we determine that Worchester satisfied the requirements for setting aside the foreclosure sale and is entitled to relief under California law, this appeal is not moot....

Id. (Citations omitted).

The single controlling issue before this Court on appeal is whether Sheikh Al-Ibrahim should be allowed to secure and enjoy a 100% interest in MIPL's assets by violating his fiduciary duty as a partner considering the facts of why and how the partnership originated. To call this issue "moot" because of the existence of "New Owners" who would be "unfairly prejudiced" by the imposition of a

constructive trust ignores the clear, undisputed reality that Sheikh Al-Ibrahim is both the old and the new owner. While once he owned 49.9% of MIPL's assets, now he owns 100%. One cannot look in the mirror and pose this question without acknowledging the correctness of the foregoing factual statement. By imposing a constructive trust on the New Owners' interests in the former assets of MIPL, this Court can afford complete relief without adversely affecting the interests of any third party. Thus, this Appeal is not moot, the Decision Below is erroneous and the implications of state partnership law, applied in conjunction with 11 U.S.C. §§ 1129(a)(3) and 1129(b), are of national import.

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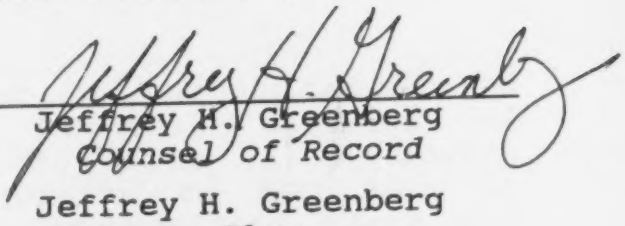
CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

By: 
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Appendix

Exhibit 1: Memorandum of the Ninth Circuit Court of Appeals filed June 16, 1995

Exhibit 2: Memorandum of the Bankruptcy Appellate Panel of the Ninth Circuit filed December 29, 1993

Exhibit 3: Order of the United States Bankruptcy Court, Central District of California, entitled, *Order (1) Approving Non-Adverse Modification to MGC Plan as Incorporated in Joint Modified Plan; (2) Confirming Joint Modified Plan; and (3) Fixing Bar Dates Respecting Joint Modified Plan*, filed April 30, 1993

Exhibit 4: Order of the Ninth Circuit Court of Appeals filed July 12, 1995

Exhibit 5: Order of the Bankruptcy Appellate Panel of the Ninth Circuit filed Feb 11 1994

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: MARINA INTERNATIONAL PROPERTIES, LTD.,	)	No. 94-55309
Debtor,	)	BAP No. CC-93-1585-MeOH
ABRAHAM M. LURIE,	)	
Appellant,	)	**MEMORANDUM***
v.	)	
RICHARD A. HALDERMAN, JR., Trustee; BANK OF MONTREAL; MARINA GROUP OF COMPANIES,	)	Filed Jun 16 1995 Cathy A. Catterson Clerk US Court of Appeals
Appellees.	)	

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Meyers, Ollason, and Higdon**,
Bankruptcy Judges, Presiding

Submitted June 9, 1995***
Pasadena, California

Before PREGERSON, POOLE AND D.W. NELSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable Polly S. Higdon, Bankruptcy Judge for the District of Oregon, sitting by designation.

*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Abraham M. Lurie appeals the decision of the Bankruptcy Appellate Panel ("BAP") dismissing as moot his challenge to the plan of reorganization confirmed by the bankruptcy court. Lurie argues that he was the victim of a plot by his former partner to use the courts to squeeze him out of the partnership and strip him of his interests in the partnership. We have jurisdiction pursuant to 28 U.S.C. § 158. We affirm the BAP's decision on mootness grounds.

I. FACTS

The relevant facts are largely undisputed. Abraham M. Lurie and Real Property Management ("RPM"), a corporation wholly-owned by Lurie, were the sole partners of Marina International Properties, Ltd. ("MIPL"), a California partnership that owned ten properties in Marina del Rey. When MIPL experienced cash-flow problems, Lurie entered into negotiations with Sheikh Al-Ibrahim to secure additional funding. On June 21, 1989, MIPL and several entities owned by Al-Ibrahim ("the Marina Group")

executed an agreement admitting the Marina Group as a general partner with a 49.9% interest in MIPL, in exchange for the Marina Group's investment of $21,830,000 in the partnership. The partnership then obtained an extension of its loan from its largest secured creditor, the Bank of Montreal ("BOM").

By 1990, however, MIPL required additional funding. On October 26, 1990, Lurie, RPM and the Marina Group entered into a binding letter of intent stating that Lurie would sell his interest in MIPL to the Marina Group, and requiring arbitration in the event of a dispute or default. The sale never occurred and the parties did not seek arbitration. In March 1991, the Marina Group filed an action in state court to dissolve the partnership. The state court appointed a receiver for MIPL, who suggested that MIPL file for bankruptcy.

On July 10, 1991, the receiver, with consent of the partners, filed a voluntary petition for Chapter 11 reorganization on behalf of MIPL. The Marina Group, Lurie, and BOM each

proposed plans for reorganization. Lurie was forced to withdraw his plan when he was unable to secured sufficient funding. On April 19, 1993, the Marina Group, BOM and the trustee in bankruptcy proposed a Joint Consensual Modified Plan of Reorganization ("Joint Modified Plan") that dissolved MIPL, extinguished the equity interests of the Marina Group, Lurie and RPM, and transferred all of MIPL's assets to the "New Owners," another group of entities owned by Al-Ibrahim, in exchange for the New Owners' contribution of $10 million to the MIPL estate. Lurie objected to the Joint Modified Plan, claiming that it seized MIPL's assets for Al-Ibrahim in violation of the Marina Group's fiduciary duty to Lurie, that it was not proposed in good faith as required by 11 U.S.C. § 1129(a)(3), and that it was not fair and equitable to Lurie pursuant to 11 U.S.C. § 1129(b).

The bankruptcy court issued an order on April 30, 1993 confirming the Joint Modified Plan over Lurie's objection. Lurie failed to

seek a stay of the bankruptcy court's order and the Plan was subsequently completed. The BAP dismissed Lurie's appeal as moot. Lurie now appeals to this court requesting that he be granted a constructive trust in 50.1% of the New Owners' holdings to be governed by the June 21, 1989 partnership agreement.

II. STANDARD OF REVIEW

We review the decision of the BAP de novo. In re Johnston, 21 F.3d 323, 326 (9th Cir. 1994); Aiona v. Judiciary of the State of Hawaii, 17 F.3d 1244 (9th Cir. 1994). We review the bankruptcy court's conclusions of law de novo and its finding of facts under the clearly erroneous standard. Johnston, 21 F.3d at 326; In re Unicom Computer Corp., 13 F.3d 321, 323 (9th Cir. 1994).

III. MOOTNESS

Lurie claims that the Marina Group breached its fiduciary duty to the partnership by selling the partnership assets to the New Owners over Lurie's overt objection, and that it proposed its reorganization plan in bad faith to oust

Lurie from the partnership and deprive him of his partnership interests.

Before we address these arguments, we must determine whether we could fashion any effective relief if Lurie prevailed. Lurie failed to seek a stay pending appeal. The Joint Modified Plan has been effected and appellees and other creditors have taken steps in reliance on the Plan. In general, a stay of an order must "be obtained if review on appeal is not to be foreclosed because of mootness." In re Roberts Farms, Inc., 652 F.2d 793, 796 (9th Cir. 1981). This policy is intended to insure that actions taken in accordance with that order are not thereafter subject to reversal. Id.

A case will not be dismissed as moot, however, where courts find themselves able to "unscramble the eggs" and fashion relief that is both effective and equitable. Id.; see also In re Spirtos, 992 F.2d 1004, 1006 (9th Cir. 1993). Lurie contends that this equitable exception applies to his case. Lurie argues that he is entitled to a 50.1% of any benefits the

partnership reaps prior to its termination. Lurie claims that since the New Owners are owned by the same persons who own the Marina Group, he should be granted a constructive trust in the New Owners' interests that will be governed by his earlier partnership agreement with the Marina Group.[1] He argues that this constructive trust will afford him relief without upsetting the actions taken in reliance on the Plan.

Lurie actually wants to dilute Al-Ibrahim's control of the newly reorganized company in order to remedy his loss of control in the former partnership. Lurie cannot obtain the relief he desires without asking this court to unravel the steps taken by appellees and third parties who are not parties to this appeal in reliance on the Joint Modified Plan. His case

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[1] Appellees argue that because Lurie failed to raise the issue of constructive trust before the bankruptcy court, he cannot raise it on appeal. The issue before this court, however, is whether Lurie's appeal of the bankruptcy court order confirming the Joint Modified Plan over his objection is moot. We address the constructive trust not as an independent issue, but as an equitable remedy offered in furtherance of Lurie's objection to the confirmation of the Plan.

is indistinguishable from the classic cases of mootness in the bankruptcy context where "the debtor has failed to seek a stay of foreclosure and the debtor's property has been sold," and where a party opposing a plan of reorganization has failed to obtain a stay, and the plan has been so far implemented that disapproval at the appellate level "would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court." See In re Baker & Drake, Inc., 35 F.3d 1348, 1351 (9th Cir. 1994) (citations omitted). Lurie is thus prevented from challenging the bankruptcy court's confirmation of the Joint Modified Plan by his failure to seek a stay pending appeal.

The decision of the Bankruptcy Appellate Panel is **AFFIRMED**.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: MARINA INTERNATIONAL PROPERTIES, LTD., Debtor,	BAP No. CC-93-1585-MeOH Bankruptcy No. LA 91-82632-CA
ABRAHAM M. LURIE, Appellant, v. RICHARD A. HALDERMAN, JR., Trustee; BANK OF MONTREAL; MARINA GROUP OF COMPANIES, Appellees.	**MEMORANDUM**

Filed
Dec 29 1993
Nancy B. Dickerson
Clerk
US Bkcy.App.Panel
of the Ninth Circuit

Argued and Submitted
November 18, 1993 in Pasadena, California

Filed: Dec 29 1993

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Calvin K. Ashland
Chief Bankruptcy Judge, Presiding

Before: MEYERS, OLLASON and HIGDON[1], Bankruptcy Judges.

I

A partner of the debtor partnership appeals the order confirming the Chapter 11 plan on the basis that the other partners unlawfully excluded him from their proposal to buy the debtor's assets.

We **DISMISS** the appeal as moot.

II

FACTS

In 1986, the sole partners of Marina International Properties, Ltd. ("Debtor"), were Abraham Lurie and Real Property Management, Inc. ("RPM"), a corporation wholly owned by Lurie. The Debtor began refinancing several of its properties in 1987, and in 1988, Lurie commenced discussions with representatives of Sheikh Abdulazia Al-Ibrahim, the controlling principal of the Marina Group of companies. The Marina Group was admitted as a general partner of the

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[1] Honorable Polly S. Higdon, Bankruptcy Judge for the District of Oregon, sitting by designation.

Debtor and the Debtor's "Fourth Amended and Restated Agreement of Limited Partnership" became effective on August 24, 1989. The Marina Group invested $21,830,000 in the Debtor in return for a 49.9 percent interest in the Debtor. Lurie and RPM retained a 50.1 percent interest in the Debtor as both general and limited partners with an acknowledged capital account of $21,917,495.

In March, 1991, the Marina Group filed an action to dissolve the Debtor in state court. Retired Judge Robert Lopez was appointed by the state court as receiver of the Debtor. On July 10, 1991, with the consent of the partners, Lopez caused the Debtor to file a Chapter 11 bankruptcy petition. During administration of the case, Lopez died and Richard A. Halderman, Jr. was appointed as trustee of the estate.

The Marina Group filed a plan of reorganization on April 15, 1992. The plan called for a new value contribution exclusively from Sheikh Al-Ibrahim and provided that Lurie's interest in the Debtor would be extinguished.

Lurie filed a plan of reorganization on June 15, 1992, which provided that the Marina Group's interest in the Debtor would be extinguished and then reissued to new investors. The Marina Group filed an amended plan on the same day. The Bank of Montreal ("Bank") also filed a plan which the Trustee joined in shortly thereafter.

After all of the plans were amended in August, 1992, the court approved the disclosure statements as to each of the three competing plans. The confirmation hearing began on December 1, 1992. On the second day of the hearing, Lurie withdrew his plan because he lost his funding support. The hearing was conducted over a period of ten days in December, 1992 and January and February, 1993.

On April 19, 1993, the Marina Group, the Bank and the Trustee filed a "Joint Consensual Modified Plan of Reorganization Dated April 19, 1993" (the "Joint Plan"). The Joint Plan was modeled on the Marina Group's second amended plan.

On April 29, 1993, the bankruptcy court conducted a hearing concerning confirmation of the Joint Plan. On April 30, 1993, the court announced its decision to overrule Lurie's objections and confirm the Joint Plan. It executed the confirmation order and findings of fact and conclusions of law. Lurie filed an appeal from the order confirming the Joint Plan. He did not seek a stay of the order.

According to the terms of the Joint Plan and the undisputed declaration of Clayton Corwin[2], a director and officer of each of the ten new corporations which make up the three new partnerships (the "New Owners"), which acquired the Debtor's properties through the confirmation process, the following actions have occurred since the plan confirmation order was entered: The assets of the Debtor were transferred to the New Owners and the Debtor was dissolved. The New Owners gave the trustee $10,043,000, almost half of which was distributed to four secured

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[2] "Declaration of the Marina Group of Companies Re Mootness," filed with the Bankruptcy Appellate Panel on October 12, 1993.

creditors and to the convenience class of small creditors. The New Owners delivered a $1,500,000 irrevocable letter of credit to Great Western Bank and a $200,000 irrevocable letter of credit to the Resolution Trust Corporation. They paid debt service on the properties in the sum of $2,689,000. Approximately 18 employees were terminated and paid termination incentive compensation of approximately $60,000. The New Owners have paid management fees of approximately $180,000 and have expended approximately $185,000 for deferred maintenance of the properties. The New Owners have so far refunded or applied in the ordinary course of business approximately $98,000 out of the $1,100,000 in tenant security deposits for which they assumed liability pursuant to the Joint Plan.

III

DISCUSSION

The appellees argue that the appeal is moot. The mootness doctrine allows a reviewing court to strike an appropriate balance between the equitable notions of finality and good faith

reliance on a judgment, and the competing interests underlying the right of a party to appeal an adverse ruling. Matter of Specialty Equipment Companies, Inc., 3 F.3d 1043, 1048 (7th Cir. 1993). Generally an appeal will be dismissed as moot when events occur which prevent the appellate court from granting any effective relief. In re Spirtos, 992 F.2d 1004, 1006 (9th Cir. 1993); In re Southwest Products, Inc., 144 B.R. 100, 104 (9th Cir. BAP 1992). Courts have reasoned that when there are many intricate and involved transactions contemplated by a plan of reorganization, which stand solely upon the order confirming the plan, reversal of the order confirming the plan, "which would knock the props out from under the authorization for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court." In re Roberts Farms, Inc., 652 F.2d 793, 797 (9th Cir. 1981). Effective relief is impossible if funds have been disbursed to persons who are not parties to the appeal or if

failure to obtain a stay has permitted such a comprehensive change as to render it inequitable to consider the merits of the appeal. In re Blumer, 66 B.R. 109, 113 (9th Cir. BAP 1986), aff'd, 826 F.2d 1069 (9th Cir. 1987).

When a plan confirmation order has not been stayed and the plan has been substantially consummated, appeals seeking to attack the confirmed plan may be precluded. In re Clarke, 98 B.R. 979, 980 (9th Cir. BAP 1989). Substantial consummation means "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2); In re Jorgensen, 66 B.R. 104, 106 (9th Cir. BAP 1986). Whether there is substantial consummation of a plan of reorganization turns on the facts of each case. 66 B.R. at 106.

An appellate court may take judicial notice of developments subsequent to the filing of the notice of appeal. In re Victory Const. Co., Inc., 37 B.R. 222, 227 (9th Cir. BAP 1984); In re Omoto, 85 B.R. 98, 100 (9th Cir. BAP 1988). Here, millions of dollars have been transferred and numerous intricate and involved transactions have been conducted pursuant to the Joint Plan, including payments of large sums of money to persons and entities who are not parties to the appeal. Under the general doctrine of mootness discussed in such cases as Roberts Farms and Blumer, this appeal should be dismissed. And because the assets of the Debtor were transferred to the New Owners, the New Owners are now managing the property formerly held by the Debtor and the New Owners have distributed millions of dollars to creditors in accordance with the Joint Plan, the Panel finds that the Joint Plan has been substantially consummated and therefore should not be upset on appeal.

Lurie claims that the properties purchased by the New Owners should be held in constructive

trust for the benefit of the Debtor because the Joint Plan was proposed in a bad faith attempt to allow the Marina Group to violate its fiduciary duties as Lurie's partner. Even if the Panel were to find bad faith, imposition of a constructive trust on the assets which the New Owners purchased would inequitably impugn the accepted notions of finality and good faith reliance on a judgment. Lurie has not proposed a solution for undoing the transactions which the New Owners entered into in reliance of the plan confirmation order, such as the distribution of millions of dollars to creditors; the tenant security deposits refunded by the New Owners; and the severance payments made to former employees of the Debtor. Reversal of the plan confirmation order, which was entered only after difficult and extensive litigation in the bankruptcy court, would create the type of unmanageable, uncontrollable situation which the court in Roberts Farms warned against.

Furthermore, when an appellant does not attempt to obtain a stay pending appeal, such

conduct has been recognized as "procedural ineptitude" in view of the unambiguous directions of Fed.R.Bankr.P. 8005. In re Clarke, supra, 98 B.R. at 980. An entirely separate and independent ground for dismissal may be established when appellants fail to seek a stay and have permitted such a comprehensive change of circumstances to occur as to render it inequitable to consider the merits of the appeal. In re Roberts Farms, Inc., supra, 652 F.2d at 798. Such is the case here. This appeal was heard over six months after the plan confirmation order was entered. During this time, Lurie never sought a stay of the order.

This appeal is **DISMISSED** as moot.

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Filed
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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re: MARINA INTERNATIONAL PROPERTIES, LTD.,	Case No. LA 91-82632-CA
	Chapter 11
Debtor.	Dt: April 29, 1993 Tm: 10:00 a.m. Pl: Courtroom 1639 255 E.Temple St. Los Angeles, CA

ORDER (1) APPROVING NON-ADVERSE MODIFICATION TO MGC PLAN AS INCORPORATED IN JOINT MODIFIED PLAN; (2) CONFIRMING JOINT MODIFIED PLAN; AND (3) FIXING BAR DATES RESPECTING JOINT MODIFIED PLAN

On December 1, 2 and 3, 1992, January 6, 7, 13 and 14, 1993 and February 9, 10 and 11, 1993, a hearing was held before the Honorable Calvin K. Ashland, United States Bankruptcy Judge, to consider confirmation of two competing plans of reorganization: (1) the "Second Amended Plan of Reorganization Proposed by Certain Equity Security Holders (August 19, 1992), as Modified" ("MGC Plan"), filed by the Marina Group of Companies[1] ("Marina Group") and (2) the "Revised Plan of Reorganization Dated August 19, 1992" ("Creditors' Plan"), jointly proposed by Bank of Montreal, a Canadian chartered bank ("BOM"), the Official Unsecured Creditors' Committee ("Committee") and Richard A. Halderman, Jr., chapter 11 trustee ("Trustee"). On April 20,

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[1] Capitalized terms not defined in this Confirmation Order shall have the meanings set forth in the Joint Modified Plan or, if not defined therein, then in the Findings of Fact and Conclusions of Law in support hereof.

and April 29, 1993, a hearing was held before the Court respecting the Joint Consensual Modified Plan of Reorganization Dated April 19, 1993 ("Joint Modified Plan")[2], filed jointly by the Marina Group, BOM and the Trustee. (The hearings held in December, 1992 and January, February and April, 1993 shall hereinafter be collectively referred to as the "Confirmation Hearing.") Appearances were as set forth in the record of the Confirmation Hearing.

The Joint Modified Plan takes the form of a consensual non-adverse modification of the MGC Plan and represents a compromise and settlement of pending disputes among the Marina Group, BOM, the Trustee and certain of the secured lenders regarding confirmation of a plan of reorgani-

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[2] The principal provisions of the Joint Modified Plan were contained in the "Joint Consensual Non-Adverse Modification to Second Amended Plan of Reorganization Proposed by Certain Equity Security Holders (August 19, 1992), as Modified", was filed on April 14, 1993 and served on certain interested parties on April 13, 1993 (including Abraham Lurie and the secured lenders) and on April 14, 1993 (including all creditors listed on the special notice list and all creditors who submitted ballots with respect to the prior competing plans.)

zation in the Case.

The Court having separately entered its Findings of Fact and Conclusions of Law Regarding Confirmation of the Joint Modified Plan ("Findings and Conclusions"); a summary of the Joint Modified Plan having been transmitted to creditors and equity security holders; and it having been determined after hearing on sufficient notice under the circumstances of this Case that the requirements for confirmation set forth in 11 U.S.C. §§ 1129(a) and (b) have been satisfied; and good cause appearing, including that confirmation of the Joint Modified Plan is in the best interests of the Estate, its creditors and other parties in interest; therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The modifications to the MGC Plan as reflected in the Joint Modified Plan: (a) do not adversely change the treatment of the claim of any Creditor or the interest of any equity security holder who has not accepted in writing

the modification; (b) meet all of the statutory requirements of 11 U.S.C. §§ 1122 and 1123; and (c) comply with the requirements of 11 U.S.C. §1125 on the basis of the "Revised Disclosure Statement with Respect to Second Amended Plan of Reorganization Proposed by Certain Equity Security Holders (August 19, 1992)", previously approved by the Court and transmitted to all creditors and interested parties; and therefore such modifications are approved pursuant to 11 U.S.C. § 1127(a) and Fed. R. Bankr. P. 3019.

2. The Joint Modified Plan, a copy of which is attached hereto as Exhibit "1", filed by the Marina Group, BOM and the Trustee on April 19, 1993 is confirmed.

3. All pending objections to the Joint Modified Plan (and, to the extent incorporated therein by reference, the MGC Plan), which were not withdrawn prior to the date of the Confirmation Hearing, are overruled.

4. Article XIII of the Joint Modified Plan is deemed modified as follows:

(a) In paragraph K.1., clause (x),

the word "by" is inserted after "Trustee" and before "Bank of Montreal";

(b) The last sentence of paragraph K.1. is modified to read as follows: "In connection with such release, all litigation pending against Mitsui, Great Western or any other releasee, on behalf of the Debtor or the Estate shall be dismissed with prejudice;

(c) In paragraph K.2., clause (i), insert the words "or entities" after "individuals" and before "for"; and

(d) paragraph K.3.: the reference to "Mitsui" is deleted.

5. Richard A. Halderman, Jr., is designated as the Disbursing Agent pursuant to Article XIII(D) of the Joint Modified Plan and is authorized to make distributions to Creditors under the Plan including, but not limited to, disbursements to holders of Administrative Claims, Tax Claims, Priority Claims, Property Tax Claims, Class 18 Claims and Class 19 General Unsecured Claims.

6. Richard A. Halderman, Jr., is

designated as the Representative of the Post-Confirmation Estate, and is authorized from and after the Effective Date to direct the affairs of the Post-Confirmation Estate and implement the purposes thereof, pursuant to the provisions of the Joint Modified Plan. Except as expressly provided in the Joint Modified Plan and accompanying documents, Mr. Halderman's duties shall run solely to the Post-Confirmation Estate, and not to the Reorganized Debtor.

7. Richard A. Halderman, Jr., as chapter 11 trustee of the Debtor, is authorized to execute the documents relating to the Joint Modified Plan, including the Asset Purchase Agreement in substantially the form submitted at or prior to the Confirmation Hearing (with such modifications as may be mutually agreed upon by the Trustee, Bank of Montreal and the Marina Group), and to take such actions on behalf of the Debtor as are necessary and appropriate to effectuate the transactions provided for in the Joint Modified Plan.

8. Cause exists for BOM to change its

votes rejecting the MGC Plan to an acceptance of the Joint Modified Plan and, therefore, pursuant to the written acceptance of the Joint Modified Plan filed by BOM in accordance with Fed. R. Bankr. P. 3019, such change of vote is approved pursuant to Fed. R. Bankr. P. 3018(a).

9. Effective as of the Effective Date, each of the executory contracts and unexpired leases to which the Debtor is a party (including, without limitation, the Doubletree management contract and related agreements[3] and that certain license agreement between the Debtor and Radisson Hotels International, Inc., which manages, with its affiliates, a system of resorts known as the "Colony International Resorts") shall be deemed rejected, except for the following: (a) all contracts and unexpired leases listed in the List of Assumed Executory Contracts to be amended or filed on or before the Effective Date; (b) the Ground Leases with

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[3] Doubletree has voluntarily waived any Claims, administrative or other, to which it may have been entitled arising from the rejection of its management contract and related agreements as provided in the Joint Modified Plan.

the County of Los Angeles relating to the Properties; and (c) any and all space leases, rental agreements and the like with residential and commercial Tenants or other occupants of the Properties under which the Debtor or the Estate is the lessor or landlord.

10. Subject to further order of this Court, each Person who is a party to an executory contract or lease which is rejected pursuant to Article IX of the Joint Modified Plan and this Confirmation Order shall file a proof of claim for any Claim arising from such rejection within sixty (60) days after the mailing of the notice of entry of this Confirmation Order.

11. Effective as of the Effective Date, the following executory contracts and unexpired leases to which the Debtor is a party shall be assumed and (on the Consummation Date) assigned to the Reorganized Debtor in accordance with Article XIV of the Joint Modified Plan; (a) all contracts and unexpired leases listed in the List of Assumed Executory Contracts to be

amended or filed on or before the Effective Date; and (b) any and all space leases, rental agreements and the like with residential and commercial Tenants or other occupants of the Properties under which the Debtor or the Estate is the lessor or landlord. In addition, the Ground Leases with the County of Los Angeles relating to the Properties are assumed as of the Effective Date and assigned as of the Consummation Date to the Reorganized Debtor upon payment by the Post-Confirmation Estate to the County of the amount computed to reflect the agreement reached by the Trustee and the County with respect to the cure of all past defaults asserted by the County as of the date hereof under the Ground leases which payment shall bring such leases current with respect to such asserted defaults pursuant to 11 U.S.C. § 365. Any as yet unasserted amounts which may be due the County shall be the responsibility of the Reorganized Debtor, but as between the Post-Confirmation Estate and the Reorganized Debtor, shall be the responsibility of the Post-

Confirmation Estate to the extent that they are for periods prior to April 1, 1993 and shall be the responsibility of the Reorganized Debtor to the extent they are for periods after April 1, 1993.

12. Subject to further order of this Court, each Person (other than residential or commercial Tenants) who is a party to an executory contract or lease which is assumed pursuant to this Confirmation Order shall file a request for payment of Administrative Claim, which request shall be filed within sixty (60) days after the mailing of the notice of entry of this Confirmation Order.

13. All requests for payment of administrative expenses incurred on or before the Effective Date pursuant to 11 U.S.C. §§ 503(b) and 507(a)(1) including, without limitation, all applications for compensation and/or reimbursement of expenses, shall be filed no later than sixty (60) days after the Effective Date (but excluding payment on account of post-petition Claims incurred in the ordinary course of

business).

14. On the Effective Date, the liquor licenses for the hotel Properties, which are currently held in the name of Real Property Management, Inc., as agent for the Debtor, will be assigned and transferred to the Trustee and the Trustee is authorized and empowered to subsequently transfer and assign the liquor licenses to Marina Operating Inc. pursuant to Cal. Bus. & Prof. Code § 24071 and the ABC Department Instructions, Interpretations, and Procedures Manual L.210.2, ¶6, so that the successor in interest to the Reorganized Debtor may continue to offer and sell alcoholic beverages on the Properties in the ordinary course of business without disruption.

15. Except as expressly provided in the Joint Modified Plan, pursuant to 11 U.S.C. § 1141(c), the property dealt with by the Joint Modified Plan is free and clear of all claims and interests of creditors, equity security holders and of general partners in the Debtor.

16. All of the Liens to be recognized,

continued, or created in favor of the secured creditors of the Debtor under the Joint Modified Plan are deemed valid and perfected on, and to have a priority as of the date of original perfection if such Lien is recognized and confirmed under the Joint Modified Plan, or the Effective date if such Lien is created under the Joint Modified Plan, without any further action on the part of the Debtor, the Reorganized Debtor, MGC Marina del Rey International, MGC Marina Beach, MGC Commercial, or any other Person, and without any requirement of filing or recording of financing statements, deeds of trust, mortgages or other evidence of such Liens.

17. For purposes of determining the Deferred Rent due Los Angeles County with respect to the Marina Beach Hotel Property, the Amended and Reinstated Bank of Montreal Note constitutes permanent financing within the meaning of the ground lease. Further, the applicable interest rate for purposes of calculating the amount of Deferred Rent (other

than the portion thereof that bears 20% interest per annum) is deemed to be 6.7% per annum.

18. AA Commercial Inc., IM Commercial, Inc., FV Commercial, Inc., MBSC Commercial, Inc., MW Commercial, Inc., P44 Commercial, Inc., MDR Hotel, Inc., MI Hotel, Inc., and MB Hotel II; and MGC Commercial, a California partnership, MGC Marina Beach, a California partnership, and Bank of Montreal, and each of them, (i) are not, and shall not be deemed to constitute successors in interest to, or liable for any claim against, or debt or obligation of, the Debtor or the Marina Group of Companies, or any of them, except as expressly provided in the Joint Modified Plan; and (ii) are deemed to be bona fide purchasers for value of the respective Properties to be acquired by the aforesaid partnerships, including without limitation, for the purpose of, and within the meaning of that term as used in, Section 531.2 of the California Revenue and Taxation Code.

19. The issuance, transfer or exchange of any partnership interest; the recognition,

continuation or creation of Liens on property of the Debtor; or the transfer of any property pursuant to the Joint Modified Plan or the accompanying documents, may not be taxed under any law imposing a stamp tax, transfer tax or other similar tax.

20. The Court shall retain jurisdiction over this Case, and exclusive jurisdiction over certain matters, to the extent provided in the Joint Modified Plan, including exclusive jurisdiction over all controversies, disputes and suits which may arise in connection with the interpretation or enforcement of the Joint Modified Plan or any accompanying document, or in connection with the enforcement of remedies under the Joint Modified Plan or any accompanying document. To the extent that the Court shall not have jurisdiction over a particular matter or the jurisdiction of the Court shall not be exclusive, or the Court shall decline to hear or abstain from hearing a particular matter, Creditors may bring proceedings in any court with jurisdiction over such matter and the

parties thereto.

21. Upon entry of this Confirmation order and pursuant to Article II(B) of the Joint Modified Plan, the Debtor shall promptly serve on all remaining known unsecured creditors holding Claims in excess of $7,500 a "Notice of Bar Date for Opting into Class 18 Pursuant to Joint Consensual Modified Plan of Reorganization Dated April 19, 1993" ("Notice") which bar date shall be thirty (30) days after the mailing of such Notice. The Notice, substantially in the form attached hereto as Exhibit "2", is hereby approved.

22. This Confirmation Order is hereby declared to be in recordable form, and shall be accepted by any recording officer for filing and recording purposes without further or additional orders, certifications, or other supporting documents.

23. Notice of the Confirmation Hearing was sufficient under the circumstances of this Case.

24. Within ten (10) days after entry of this Confirmation Order, the Debtor shall mail

to all entities specified in Fed. R. Bankr. P. 2002(f), (i), (j) and (k) notice of entry of this Confirmation Order, together with notice of the last day for filing administrative expense Claims, Claims arising from the rejection of executory contracts and leases, and applications for allowance of compensation and/or reimbursement of administrative expenses.

25. Within ten (10) days after the occurrence of the Effective Date, the Reorganized Debtor shall mail to all parties in interest notice thereof.

Dated: April 30, 1993

/s/
CALVIN K. ASHLAND
UNITED STATES BANKRUPTCY JUDGE

PREPARED AND SUBMITTED BY:

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: MARINA INTERNATIONAL PROPERTIES, LTD., Debtor,	No. 94-55309 BAP No. CC-93-1585-MeOH
ABRAHAM M. LURIE, Appellant, v. RICHARD A. HALDERMAN, JR., Trustee; BANK OF MONTREAL; MARINA GROUP OF COMPANIES, Appellees.	ORDER

Filed
July 12 1995
Cathy A. Catterson
Clerk
US Court of Appeals

Before: PREGERSON, POOLE and D.W. NELSON, Circuit Judges.

Appellant's petition for rehearing is denied.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: MARINA INTERNATIONAL PROPERTIES, LTD.,	BAP No. CC-93-1585-MeOH
Debtor,	Bankruptcy No. LA 91-82632-CA
ABRAHAM M. LURIE,	
Appellant,	**ORDER DENYING REHEARING**
v.	
RICHARD A. HALDERMAN, JR., Trustee; BANK OF MONTREAL; MARINA GROUP OF COMPANIES,	Filed Feb // 1994 Nancy B. Dickerson Clerk US Bkcy.App.Panel of the Ninth Circuit
Appellees.	

Before: MEYERS, OLLASON and HIGDON[1], Bankruptcy Judges.

The Panel has received and reviewed appellant's motion for rehearing, appellee Marina Group of Properties' response and appellee Halderman's joinder in the response.

The motion for rehearing is hereby ORDERED DENIED.

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[1] *Hon. Polly S. Higdon, Bankruptcy Judge for the District of Oregon, sitting by designation.*